IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1704

MARJORIE LEHMAN,

Petitioner,

—v.—

LYCOMING COUNTY CHILDREN'S SERVICES, *et al.*,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

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The Petitioner, Marjorie Lehman, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Supreme Court of Pennsylvania, Eastern District, entered on January 31, 1978, which affirmed, with two justices dissenting, an order of the Pennsylvania Court of Common Pleas, Orphans' Court Division, entered on June 3, 1976.

OPINIONS BELOW

The opinion of the Supreme Court of Pennsylvania, Eastern District, and the two dissenting opinions are reported at 383 A.2d

1228, sub nom., In re William L. The majority and two dissenting opinions are set out in the Appendix, infra, pp. 1a-67a. The findings, Discussion and Order of the Orphans' Court are unreported and are set forth in the Appendix, infra, pp. 68a-73a.

JURISDICTION

The judgment of the Pennsylvania Supreme Court was entered on January 31, 1978. On April 21, 1978, Mr. Justice Brennan entered an order extending the time to file this petition for certiorari to and including May 31, 1978. The jurisdiction of this Court is invoked pursuant to Title 28, U.S.C. Section 1257(3).

QUESTIONS PRESENTED

I

WHETHER THE DUE PROCESS CLAUSE PERMITS A STATE TO TERMINATE PARENTAL RIGHTS INVOLUNTARILY IN THE ABSENCE OF PAST, PRESENT OR LIKELIHOOD OF FUTURE SERIOUS HARM TO CHILDREN, SOLELY BECAUSE OF THE PARENT'S INTELLECTUAL LIMITATIONS AND THE AVAILABILITY OF A "MORE STIMULATING ENVIRONMENT" ELSEWHERE.

II

WHETHER THE PENNSYLVANIA TERMINATION STANDARD OF PARENTAL "INCAPACITY ... [WHICH] HAS CAUSED THE CHILD TO BE WITHOUT ESSENTIAL CARE, CONTROL OR SUBSISTENCE NECESSARY FOR HIS PHYSICAL OR MENTAL WELL-BEING" [P.S. §311(2)]

IS VOID FOR VAGUENESS IN VIOLATION OF THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT.

III

WHETHER THE FOURTEENTH AMENDMENT PERMITS PERMANENT TERMINATION OF THE PARENTAL RIGHTS OF A FAULTLESS BUT "INCAPACITATED" PARENT WHEN LESS DRASTIC ALTERNATIVES FOR THE CARE AND PROTECTION OF THE CHILDREN ARE AVAILABLE.

STATUTE INVOLVED

1 Pennsylvania Statutes, §311(2)(Supp. 1977) provides:

> The rights of a parent in regard to a child may be terminated after a petition filed pursuant to Section 312 and a hearing held pursuant to Section 313, on the ground that: . . .
>
> (2) the repeated and continued incapacity, abuse, neglect, or refusal of the parent has caused the child to be without essential parental care, control, or subsistence necessary for his physical or mental well-being and the conditions and causes of the incapacity, abuse, neglect, or refusal cannot or will not be remedied by the parent.

STATEMENT OF THE CASE

On June 3, 1976, the Lycoming County Orphans' Court entered an order involuntarily terminating petitioner's parental rights to her three sons pursuant to 1 P.S. §311(2). The order was pursuant to hearings held on May 4th and 7th, 1976. At the hearings it was shown that in June, 1971, petitioner (alternatively referred to as "the mother"), then a 39-year-old woman, was living with her three sons, then ages 7, 5, and 1, and was about to give birth to her last child. She was supported by social security, public assistance grants and food stamps. Because she had nobody to care for the boys during her confinement and because her living quarters were roach-infested, she sought the aid of Lycoming County Children's Services (hereafter "the agency") for temporary foster care of the boys.

Until that time, petitioner's sons had been under her exclusive and continuous care and supervision. No report or adjudication of parental neglect had ever been made or entered against her and there is no suggestion in the record that her sons had ever been improperly cared for or mistreated while they were in her custody.

After petitioner gave birth to her daughter, Tracie, the agency offered her a small apartment suitable only for her and her new baby. After some hesitation the mother accepted, fully expecting larger quarters imminently so that she could be reunited with her sons. A schedule of one-hour monthly visits

with them in the agency's office was arranged, which the mother never missed.

Although the agency had authority to return the boys at any time, it made no effort to reunite the family "because of her [the mother's] limited abilities . . . we did not feel she was capable of taking care of four children." (Orphans' Court Transcript, p.15.) Only after the mother obtained legal assistance did she obtain a court decree in December, 1975, increasing the visits to bi-weekly and allowing the visits to take place in her own home for several hours each time. Three months later the agency filed the petition to terminate parental rights to the boys, but not to Tracie.

Tracie, the youngest child, has been in her mother's care since birth. It is uncontradicted that she is healthy and normal and that her mother is affectionate and attentive. The mother's home is always neat and orderly and she has been cooperative with nutrition aids provided since Tracie's birth, although she once did not fully comply with instructions on how to rid Tracie's hair of lice.

The mother is illiterate although she has completed the seventh grade. Intelligence tests indicate that she is in the range of the educable mentally retarded. She has had difficulty keeping track of household bills and has occasionally purchased unnecessary gifts for her children on credit.

When her sons came to her home on bi-

weekly vists, the mother prepared meals for them and entertained them. The boys played with and enjoyed each other and their sister. According to the agency's witnesses, however, the mother was unable to discipline and supervise the boys; they ran around the house and the youngest boy did not relate to her much. The mother said that the social workers' presence during the visits made her self-conscious and that she was able to supervise and control the boys better when she was alone with them.

Petitioner's sons have been in separate foster homes since their placement. The eldest, Frank, 15 years old at the hearing, has been in three different foster homes and is considered unadoptable. William, 13, has been in two homes and may be adoptable. The foster parents of Mark, age 7, do wish to adopt him. All three boys testified that they enjoyed their visits with their mother and sister and did not wish them to cease, although each stated that he did not wish to return to live in the mother's home.

On June 3, 1976, the Orphans' Court entered an order permanently severing the mother's parental rights to the three boys, thereby terminating all visitation as well. A motion for visitation pending appeal to the Pennsylvania Supreme Court was denied on October 29, 1976.

The mother is able to handle the custody of Tracie, four years old; p. 69a

The children are "healthy, active, alert youngsters." Although the mother loves her sons and wants them back and at least the two oldest return her affection, she "would not be able to provide intellectual or social stimulation for them, nor would she be able to channel and discipline their behavior;" pp.71a-72a

That by reason of "her very limited social and intellectual development combined with her five-year separation from the children, the mother is incapable of providing minimal care, control and supervision for the three children [and] her incapacity cannot and will not be remedied;" p. 72a

That "the best interests of the children" would dictate that they remain in agency custody indefinitely. p. 72a

The court made no finding that the mother had ever neglected or abused any of her children. It also ruled that section 311(2) does not offend the United States Constitution. pp. 72a-73a

On appeal to the Pennsylvania Supreme Court, the mother argued that the termination of her parental rights violated the Fourteenth Amendment because the state had no compelling interest in severing the parental relationship in the absence of an adjudication that she had ever failed to provide adequate child care in

the past or that the boys would be exposed to serious and substantial harm by her in the future. Also, she argued that the Pennsylvania standard of parental "incapacity [which] has caused the child to be without essential care, control or subsistence necessary for his physical or mental well-being" [1 P.S. § 311(2)] is impermissibly vague both on its face and as applied to her.

With two justices dissenting, the Pennsylvania Supreme Court affirmed the termination order based on "parental incapacity, which does not involve parental misconduct." p.5a. The majority held that the Legislature's power to protect the physical and emotional needs of children authorized termination in the absence of serious harm or risk of serious harm to the children and in the absence of any parental misconduct.3a-4a. It held also that the statute is not unconstitutionally vague either on its face or as here applied.

Justice Nix, dissenting, thought the termination order was unconstitutional for three reasons. First, the standard of harm to the children is too low to warrant the drastic step of involuntary termination under the Due Process Clause. Second, the standard of "parental incapacity" as applied and on its face is void for vagueness. Third, termination based upon a parent's involuntary condition or incapacity violates the Fourteenth Amendment.

Justice Manderino, also dissenting, ruled that a faultless parent, involuntarily incapacitated, cannot constitutionally be subject

to permanent termination of parental rights.

REASONS FOR GRANTING THE WRIT

I

THE INVOLUNTARY TERMINATION OF PETITIONER'S PARENTAL RIGHTS WAS IN VIOLATION OF THE FOURTEENTH AMENDMENT.

1. Because the Pennsylvania Termination Standard Requires No Showing of Serious Harm to Children, the State Has No Compelling Interest in Destroying the Family Relationship.

Petitioner's parental rights to her three sons were permanently severed in the face of an express finding that she had adequately cared for her four-year-old daughter since the child's birth, and in the absence of any finding that she had ever neglected her three sons in the years they had been in her custody. The termination order was pursuant to a state standard which, as construed by the Pennsylvania Supreme Court, authorizes termination for parental incapacity without requiring a showing that the children had ever suffered "substantial physical or mental harm." pp.3a-5a

The Pennsylvania standard in this case was satisfied solely by the mother's "limited social and intellectual development combined with her five-year separation from the children,"(p. 72a) a separation for which the state was primarily responsible. Petitioner, a demonstrably functioning parent, was thus deprived of her sons forever because a more "stimulating" environment had been found for

them; not because she ever had failed or would in the future fail to provide them with at least minimally adequate care.

The failure of the Pennsylvania termination standard to require a showing of serious harm to the children, or the imminent risk of such harm, deprives the state of a parens patriae interest compelling enough to abridge permanently a fundamental liberty that this Court has held is protected by the First, Ninth and Fourteenth Amendments. E.g., Meyer v. Nebraska, 262 U.S. 390 (1923); Stanley v. Illinois, 405 U.S. 645 (1972); Wisconsin v. Yoder, 406 U.S. 205 (1972); Moore v. East Cleveland, 431 U.S. 494 (1977). Within the past year, this Court has twice cautioned that the family unit may not be destroyed "without some showing of unfitness and for the sole reason that to do so was in the children's best interest." Smith v. Organization of Foster Families for Equality and Reform, 431 U.S. 816 (1977)(Stewart, J., concurring); Quilloin v. Walcott, __ U.S. __, 54 L.Ed.2d 511, 520 (1978).

Termination in this case functionally rests upon the comparative "best interest" standard condemned by this Court. Despite the adjudication of petitioner's "parental incapacity," the absence of past neglect or a likelihood of future serious harm, combined with a clear demonstration of her present parental functioning, amounts to termination on constitutionally impermissible grounds -- a comparative assessment that a better environment is available elsewhere.

Petitioner does not contest the trial court's findings of fact. Rather, she challenges as constitutionally defective a state standard of "incapacity" or parental unfitness which, as applied to those facts, authorizes involuntary termination of a demonstrably functioning mother's parental rights in the absence of a sufficiently high or compelling child-protection interest. Alsager v. District Court, 545 F.2d 1137 (8th Cir. 1976); Roe v. Conn, 417 F.Supp. 769 (M.D. Ala. 1976); Sims v. Texas Department of Public Welfare, 438 F.Supp. 1179 (E.D. Tex. 1977). Merely by labeling a parent "unfit" or "incapacitated" the state may not shield from constitutional scrutiny the facts to which it has applied its termination standard.[1]

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1. In cases arising under the Due Process Clause and the First Amendment, this Court "has consistenly recognized its duty to apply the applicable rules of law upon the basis of an independent review of the facts of each case." Jacobellis v. Ohio, 378 U.S. 184, 189 (1964)(whether material is obscene); Drope v. Missouri, 420 U.S. 162, 175 (1975)(competency to stand trial); Watts v. Indiana, 338 U.S. 49, 51 (1949)(voluntariness of confession).

2. The Pennsylvania Standard Is Void for Vagueness.[2]

The termination of this mother's rights under a standard of parental "incapacity ... [which] has caused the child to be without essential care, control or supervision essential to his mental or physical well-being" [1 P.S. §311(2)] is hopelessly vague on its face and as here applied. This Court has held in a variety of contexts that a statute authorizing the abridgement of a fundamental liberty must be fairly and even-handedly enforced; that it must set forth with reasonable particularlity the conduct which will justify the state's action in order to deter the enforcement agency "from creating its own standards in each case." Herndon v. Lowry, 301 U. S. 242, 263; Papachristou v. City of Jacksonville, 415 U.S. 156 (1972). Here, the adjudication of "parental incapacity" of a mother who has never harmed her children in any way because she is unable to provide "intellectual and social stimulation," is precisely the subjective, value-laden, and eccentric applica-

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2. Although the termination of parental rights in the absence of serious harm to children (Point 1., supra) is a function of statutory vagueness, Petitioner presents them as two separate issues inasmuch as a clear and precise statute which nonetheless authorizes termination in the absence of serious neglect would still violate Due Process.

tion that the vagueness doctrine is designed to prevent.

Moreover, insofar as petitioner's rights were severed despite her past and present provision of supervision, food, shelter and affection to her children, the statute fails to afford adequate notice -- the second vice of a vague statute. This Court has repeatedly held that due process of law requires that a statute be sufficiently clear that reasonable people seeking to conform their conduct to the state's requirements will be able to understand what is expected of them. See, e.g., Grayned v. City of Rockford, 404 U.S. 104 (1972); Palmer v. Euclid, 402 U.S. 544 (1971). Although the state's legitimate interest in protecting children may require some latitude in the formulation of a termination standard, the breadth and indeterminacy of the Pennsylvania standard is far in excess of that which is either necessary or desirable for the welfare of children.[3]

The majority's claim, moreover, that the statute's apparent vagueness has been elimi-

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3. See, Wald, "State Intervention on Behalf of 'Neglected' Children: Standards for Removal of Children from their Homes, Monitoring the Status of Children in Foster Care, and Termination of Parental Rights," 28 Stanford L.Rev. 623 (April 1976); Mnookin, "Foster Care -- In Whose Best Interest?" Harvard Ed. Rev., Vol. 43, no. 4 (Nov. 1973) (hereafter "Mnookin").

nated by the Pennsylvania Supreme Court's own past decisions is squarely refuted by those decisions. In its three most recent opinions in which the statute here involved was considered, the Pennsylvania Supreme Court articulated termination standards wholly inconsistent with the standard applied in this case. Adoption of R.I., 361 A.2d 296 (Pa. 1976); In re Geiger, 331 A.2d 172 (Pa. 1975); In re Brandl, 339 A.2d 759 (Pa. 1975).[4] In all

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4. In Brandl, the court vacated the termination order although the parent had been criminally prosecuted for child neglect and had been committed to a state mental hospital for ten years,because of testimony that with asistance she would be able to manage in the future. In Geiger, the court also reversed a termination order against a mentally retarded and emotionally disturbed parent who provided a "submarginal" physical and emotional atmosphere because physical needs were adequately met and "because the record does not establish that the 'physical or mental well-being' of the children suffered because of such conditions." The court expressly rejected predictions of future emotional harm as a basis for termination.

Although the court affirmed the termination order in Adoption of R.I., there the child suffered from malnutrition and bleeding body sores and the court emphasized that termination may only be resorted to upon such a showing of clear necessity.

three cases the Pennsylvania Court held that a high and palpable degree of harm to children must be demonstrated for permanent termination; that parental inadequacies alone are insufficient.

3. Even If a Faultless Parent Is Permanently Incapacitated, the State Cannot Constitutionally Terminate Parental Rights If Less Drastic Alternatives Would Provide for the Children's Basic Needs.

The decision of the Pennsylvania Supreme Court authorizes permanent severance of the parental bond for "parental incapacity, which does not involve misconduct."(p. 5a) As Justice Manderino observes in dissent, this would include a parent injured in an auto accident or one who suffers a serious physical illness. In light of the fundamental and constitutionally protected nature of the parent-child relationship, in such cases the state is obliged to provide a less drastic method of caring for children than destruction of the family.

Assuming arguendo that the mother in this case is incapacitated, the state in exercise of its parens patriae interests was obliged to continue or augment in-home services that would enable her to resume custody of her sons. At the very least, the state was obliged to continue the children's foster care status so that the mother could continue her visits and maintain her relationship with her children. This was an especially compelling course in view of the children's expressed desire to

continue the visits and the relationship.

Indeed, the state has no interest, compelling or otherwise, in terminating petitioner's rights to her oldest son, Frank. Frank had been adequately cared for by his mother for the first seven years of his life. At the time of the hearing he was fifteen years old and considered to be unadoptable by the agency. Whatever interest the state has in terminating parental rights in order to secure adoptive homes for some children, at least for Frank no such interest exists.[5]

This Court has held in a variety of contexts that where the state, in pursuit of otherwise legitimate objectives, seeks to encroach upon fundamental freedoms, it must choose means "with a lesser burden on constitutionally protected activity." Dunn v. Blumstein, 405 U.S. 330, 343 (1972); Shapiro v. Thompson, 394 U.S. 618 (1969); Shelton v. Tucker, 364 U.S. 479 (1960). Where the right to raise a family is at stake, this Court has imposed upon the state an especially heavy burden of employing means which minimize the intrusion upon family privacy and integrity. Cleveland Board of Education v. LaFleur,

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5. For the damaging consequences to children from parental termination when there is a visible and interested parent, no matter how inadequate, see, Fanshel and Shinn, CHILDREN IN FOSTER CARE, A LONGITUDINAL STUDY (Col. U. Press, 1978).

414 U.S. 632, 647 (1974); see also, Roe v. Wade, 410 U.S. 113 (1973); Moore v. East Cleveland, 431 U.S. 494 (1977).

II

A GROWING CONFLICT AMONG JURISDICTIONS AND THE LARGE NUMBER OF CHILDREN AFFECTED REQUIRES AN EARLY DETERMINATION OF THE CONSTITUTIONAL LIMITS UPON STATES IN TERMINATING PARENTAL RIGHTS.

Until recently, state courts assiduously protected the rights of the natural or biologic family unless a high level of child neglect and parental unfitness was demonstrated.[6] In the past three years, however, at least three state supreme courts have held that the comparative and subjective "child's best interest" standard may constitutionally defeat the rights of a non-neglecting and otherwise fit parent. In re J.S.R., 374 A.2d 860 (D.C.App. 1977); In re New England Home for Little Wanderers, 328 N.E.2d 854 (Mass. 1975). This change has been prompted by a recent but highly disputed child development theory which places paramount importance upon the desira-

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6. See, e.g., People ex rel. Portnoy v. Strasser, 303 N.Y. 539, 104 N.E.2d 895 (1952); In re Appeal of Rinker, 117 A.2d 780 (Pa. 1955); In re Clark's Adoption, 1 P.2d 112 (Ariz. 1931).

bility of "continuity of care."[7] The theory is being especially invoked when dilatory state practices (see footnote 12 and accompanying text, infra) and the delays of litigation have deprived a non-neglectful parent of custody for a period of time. The Pennsylvania decision below, so radical a departure from the same court's earlier decisions, is the third state to authorize termination of family relationships on this basis. See also, Bennett v. Jeffreys, 40 N.Y.2d 543 (1977).

On the other hand, one United States Court of Appeals has recently held that despite a four-year separation between parents and children, permanent termination in the absence of a high and substantial degree of harm to children constitutes a constitutional deprivation under Section 1983 of the Civil Rights Act. Alsager v. District Court, 545 F.

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7. For criticism of the "continuity of care" theory, see, e.g., Okpaku, Psychology: Impediment or Aid in Child Custody Cases? 29 Rutgers L. Rev. 1117 (1976); Book Review, Beyond the Best Interests of the Child, Strauss and Strauss, 74 Col. L. Rev. 996 (1974).

2d 1137 (8th Cir. 1976).[8] Two state supreme courts have also ruled that federal due process standards are violated by terminations under the "child's best interest" standard. Berrien v. Greene County Department of Public Welfare, 217 S.E.2d 854 (Va. 1975); In re Walter B., 4 Family Law Reporter 2380 (Utah, March 20, 1978).

Indeed, in reliance upon the Alsager case, supra, a three-judge federal court has held that even in the case of temporary state custody not involving permanent termination, the state must show that "the child is being harmed in a real and substantial way" under neglect standards that are clear and carefully defined. Roe v. Conn, 417 F.Supp. 769 (M.D. Ala. 1976). See, to the same effect, Sims v. Texas Department of Public Welfare, 438 F.Supp. 1179 (E.D. Texas 1977)("The State must make a clear showing that continued custody is necessary to protect the child from physical danger.")

There is an urgent need for this Court to resolve the question of whether states may

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8. In Alsager, the federal appeals court thus affirmed in part a lower federal court judgment that the Iowa termination statute violated due process both for failure to require a high threshold of harm to children and because of vagueness. Alsager v. District Court, 406 F.Supp. 10 (Iowa 1975).

constitutionally terminate the rights of faultless parents under vague and de minimus standards of child welfare. Close to half a million children in this country are in foster care, exclusive of those on parole from juvenile correctional institutions.[9] Of this half million, well over fifty percent were placed voluntarily by their parents in the absence of any adjudication of neglect, abuse or other parental misconduct.[10] Virtually all of these children have impoverished parents who, like petitioner, were in exigent circumstances and had nowhere to turn but to the state for tem-

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9. Statement of HEW representative John C. Young, cited in House of Representatives, Subcommittee on Select Education, Foster Care: Problems and Issues, 94th Cong. 2d Sess.,Sept. 8, 1976, 533, 541 n.1; see, Senate Committee on Labor and Public Welfare, 94th Cong., 1st Sess., Foster Care and Adoptions: Some Key Policy Issues.

10. Mnookin, supra at 601. In New York City, 82 percent of the 30,000 children in foster care are placed voluntarily for temporary care. Audit Report on Foster Care Agencies, Office of the Comptroller of the City of New York, p. 4 (May 26, 1977).

porary care for their children.[11]

This case is a striking example, moreover, of the pervasive failure or unwillingness of state agencies expeditiously to reunite foster children with their parents -- a failure largely attributable to highly subjective judgments of parental desirability.[12] If

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11. Recent studies show that over 96 percent of the foster children in California are from AFDC families. In Massachusetts, only 1.2 percent of the natural parents of foster children have annual incomes over $15,000. Pers, Government as Parent: Administering Foster Care in California (Institute of Governmental Studies, U.C.L.A. Berkley, 1976); Vasaly, Foster Care in Five States, U.S. Dept. HEW (Childrens Bureau, No. 76-30097).

12. Surveys recently conducted show that 40 percent of Massachusetts' foster children and 39 percent of California's foster children remain in placement at least five years. In New York City the average length of time is 4.7 years. Fanshel and Grundy, Computerized Data for Children in Foster Care (1975), reprinted in Foster Care: Problems and Issues, supra, note 7; Foster Care and Adoptions: Some Key Policy Issues, Senate Subcommittee on Children and Youth, 94th Cong., 1st Sess., p. 10 (Aug. 1, 1975).

the judgment of the Pennsylvania Supreme Court in this case is not reversed, it will serve as a signal that whenever more "stimulating" homes are available, the state may, if it causes enough time to lapse, sever the rights of faultless and otherwise adequate parents who turned to the state for what they thought would be temporary aid.[13]

CONCLUSION

For the reasons stated above, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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13. There are 3,000 children in New York City alone for whom court action to terminate parental rights is pending. Fanshel and Grundy, Ibid.

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